Supreme Court, U.S.
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No. 98-1566

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DONALD E. CLAPPER,

Petitioner,

v.

CHESAPEAKE CONFERENCE OF SEVENTH-DAY ADVENTISTS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Free Exercise Clause of the First Amendment, which guarantees a church's right to select its religious leaders free from governmental interference, shield it from the employment discrimination claims of its elementary school teacher whose function is inherently religious?

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STATEMENT OF JURISDICTION

Chesapeake Conference of Seventh-day Adventists ("Chesapeake Conference"), does not dispute Petitioner's contention that this Court may assert jurisdiction pursuant to 28 U.S.C. § 1254(1). It denies, however, that the constitutionality of any federal statutes is at issue in this case. The United States Court of Appeals for the Fourth Circuit made no finding as to the constitutionality of either 29 U.S.C. §§ 623(a)(1) and (2) or 42 U.S.C. §§ 2000e-2(a)(1) and (2). Rather, the Court of Appeals, relying on *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986), merely affirmed the District Court's abstention from the exercise of jurisdiction.

STATEMENT OF THE CASE

This petition arises from the unreported *per curiam* decision of the United States Court of Appeals for the Fourth Circuit affirming the District Court's dismissal of Donald Clapper's employment discrimination claims under Rule 12(b)(1) of the Federal Rules of Civil Procedure. The District Court made detailed factual findings in its jurisdictional ruling and those factual findings were not properly challenged before, or disturbed by, the Court of Appeals on review.[1] Clapper's description of the case is

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1. Although there is ample authority for the proposition that the trial court's Rule 12(b)(1) factual findings should be reviewed for clear error, *see, e.g.*, *Osbourn v. U.S.*, 918 F.2d 724, 728-31 (8th Cir. 1990); *Eaton v. Dorchester Development, Inc.*, 692 F.2d 727, 731-32 (11th Cir. 1982); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982), *Williamson v. Tucker*, 645 F.2d 404, 412-14 (Cont'd)

inconsistent with these unchallenged and undisturbed factual findings, and the statement that follows is, accordingly, drawn directly from the opinions of the Court of Appeals and the District Court.

As noted by the Court of Appeals, the evidence in this case is uncontradicted. Pet. App. 16a. Donald Clapper ("Clapper"), a former teacher for the Seventh-day Adventist Church, sued the Chesapeake Conference,[2] alleging that the decision to not renew his employment contract was based on gender and age discrimination in violation of federal statutes and his employment contract. In particular, Clapper argued that the non-renewal of his employment contract violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1),[3] and his common law contractual rights.[4] Pet. App. 2a.

(Cont'd)
(5th Cir.), *cert. denied*, 454 U.S. 897 (1981), the Court of Appeals appears instead to have applied the *de novo* standard to both factual and legal questions. Pet. App. 13a. Its factual findings do not differ in any material respect, however, from those of the District Court.

2. The Chesapeake Conference of Seventh-day Adventists is a unit of the Seventh-day Adventist Church that operates churches and schools in Maryland and neighboring states. Pet. App. 3a.

3. A typographical error in the Court of Appeals' opinion erroneously suggests that Clapper's Title VII cause of action is based on a claim of racial, rather than gender, discrimination. Pet. App. 2a. The true basis for his claim is accurately reflected in the District Court's opinion. Pet. App. 25a.

4. Chesapeake Conference's stated reasons for not renewing Clapper's contract were declining enrollment and lack of funds. (Cont'd)

Prior to the expiration of his employment contract, Clapper was an elementary school teacher for Mt. Aetna School, a Seventh-day Adventist school in Hagerstown, Maryland. Mt. Aetna School, like other Seventh-day Adventist private religious elementary and secondary schools throughout Maryland, has an "avowedly sectarian purpose." Pet. App. 3a. To further its goals, "the Seventh-day Adventist Church relies heavily upon its full-time, elementary school teachers to carry out its sectarian purpose." Pet. App. 17a. The school's operations are governed by an Education Code prescribed by the Church which is incorporated into all contracts between Chesapeake Conference and its teachers. Pet. App. 3a.

A. Clapper Mischaracterizes Seventh-day Adventist Education as Secular

Clapper implausibly recasts Seventh-day Adventist education as predominately secular. His characterization is faithless to the record and contrary to the explicit factual findings made by both courts below. The Court of Appeals, relying on the Seventh-day Adventists' Education Code, found that the Church and its schools are indistinguishable. Pet. App. 5a. Section 1028 of the Education Code provides:

> Criteria That Identifies the Seventh-day Adventist School as the Church:

(Cont'd)

The record further reflects the Church's position that Clapper was not selected for renewal based on a history of performance problems and complaints from parents and students. Pet. App. 9a. Although his claims were not adjudicated on the merits, the District Court noted that even with the benefit of full discovery, Clapper had "found little to support [them]." Pet. App. 33a.

> 1. The mission of the school and the Church are identical — redemption is the task . . .
>
> a. In studying the great commission, Matthew 28:18-20, the basic task of the Church is an educational task.
>
> b. The Seventh-day Adventist school system has as its basic evangelistic task the redemption and education of the children and youth. *In pursuing this task, it influences them more continuously than any other agency of the Church.*
>
> c. The Church operates a school system to ensure that its youth may receive a balanced physical, mental, moral, social and practical education. The primary aim of each Seventh-day Adventist educational institution is to reflect accurately and to uphold the principles of the Seventh-day Adventist Church. Seventh-day Adventist schools are to be an effective influence in the salvation of our youth and provide the workers for the world-wide task of the Church. The stated interest of the Church is the optimum development of the whole child for both this life and the life hereafter.

Pet. App. 5a (emphasis added).

As noted by the Court of Appeals, the primary purpose of elementary and secondary Seventh-day Adventist schools is "the salvation of each student's soul through his or her indoctrination in Seventh-day Adventist theological

beliefs." Pet. App. 3a. Section 1013 of the Education Code provides:

> [T]he Seventh-day Adventist Church in North America operates a program of education, kindergarten through University, that began in 1872. The Church's belief regarding Christian education is based on the Scriptures and the writings of Ellen G. White[5] which have provided the Church with a distinct philosophy of education . . .
>
> *The aim of Seventh-day Adventist education is the redemption of each student.*

Pet. App. 3a-4a (emphasis added).

Section 1019 of the Education Code further provides:

> Seventh-day Adventists conduct their own schools, elementary through university, for the purpose of transmitting to their children their own ideals, beliefs, attitudes, values, habits, and customs. The government maintains a highly developed public school system for making citizens; but in addition to being patriotic, law-abiding citizens, Seventh-day Adventists want their children to be loyal, conscientious Christians. There is peculiar to the Church a body

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5. Ellen G. White was one of the founding members of the Seventh-day Adventist Church. *See Seventh-day Adventists*, ENCYCLOPEDIA AMERICANA 620 (1991); *Ellen G. White*, ENCYCLOPEDIA OF RELIGION 377 (1987).

> of knowledge, values, and ideals that must be transmitted to the younger generation so the Church may continue to exist. In this process the Biblical principle of social transmission is recognized: "Tell ye your children of it, and let your children tell their children, and their children another generation." (Joel 1:3).

Pet. App. 4a.

B. Clapper's Own Role at Mt. Aetna School Was Inherently Religious

Clapper's daily regimen was faithful to the mission established in the Seventh-day Adventist Education Code. The record demonstrates that he led his students in prayer in the morning, at lunch, at the end of the school day, and at any time that a student made a special request for prayer. Pet. App. 9a, 32a. Clapper also counseled his students, which he characterized as part of his responsibilities in, "meet[ing] the spiritual needs of the children." Pet. App. 32a. He conducted worship each day for approximately ten minutes. Pet. App. 9a. Also, on a daily basis he taught Bible study as a formal part of the school curriculum. *Id.* Consistent with the requirements of the Education Code, Seventh-day Adventist theology was incorporated into his teaching of the traditional academic curriculum. *Id.* Also, as required by the Code, Clapper involved his students in the Seventh-day Adventist practice of witnessing, which encourages the students to apply their faith in a practical way. *Id.*

During his employment with Mt. Aetna, and consistent with the Education Code's requirements, Clapper was an

active, tithe-paying member of the Seventh-day Adventist Church. Pet. App. 9a. As prescribed by Church policy, thirty percent of Clapper's salary was paid directly from tithe funds reserved for ministerial purposes.[6] *Id.* In addition, on January 20, 1991, Clapper was awarded a "Commissioned Ministry of Teaching Credential" which demonstrated his substantial experience and profound spiritual commitment to the Church. *Id.* Clapper testified that the credential, "was to somewhat put teachers on a ministerial standing in the church because of the role we played with leading students in their spiritual life . . ." Pet. App. 7a-8a. In sum, Clapper's role as an elementary school teacher for the Seventh-day Adventists was sectarian in purpose and fact.

At the close of discovery, Chesapeake Conference moved for dismissal of Clapper's suit on the grounds that adjudication of his claims would improperly burden the Church's free exercise of religion. On August 13, 1997, in an unreported decision, the United States District Court for the District of Maryland granted Chesapeake Conference's Rule 12(b)(1) motion. Docket No. CA-95-832-WMN.

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6. The Court of Appeals noted that, "the primary purpose of Church tithes is to support an evangelistic ministry." Pet. App. 7a. The use of tithe funds to support the teaching ministry stems from the early teachings of founder Ellen White:

> Our conferences . . . should give the schools a most hearty and intelligent support. Light has been plainly given that those who minister in our schools, teaching the Word of God, explaining the Scriptures, educating the students in the things of God, should be supported by tithe money.

Pet. App. 7a n.2.

Pet. App. 24a. The court found that Clapper's claims were barred by the "ministerial exception" articulated in *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). Clapper thereafter noted a timely appeal to the United States Court of Appeals for the Fourth Circuit and on December 29, 1998 that court affirmed the District Court's decision in an unpublished *per curiam* decision bearing Docket No. 97-2648. Pet. App. 1a. Its mandate thereafter issued on January 20, 1999.

Clapper then petitioned for a writ of certiorari, seeking review in this Court of the Fourth Circuit's ruling.

REASONS FOR DENYING THE WRIT

The conflict among the circuits described in Clapper's petition is chimerical. The Court of Appeals adhered to settled law in affirming the District Court's ruling that the ministerial exception, which bars the adjudication of employment discrimination claims by religious employees, stripped it of jurisdiction to hear Clapper's claims. The ministerial exception is, in fact, widely followed in both federal and state courts without dissension. It has been invoked to bar not only the employment claims of ministers, but the claims of principals, teachers, church organists and hospital chaplains as well. What Clapper complains of is not a true division among the circuits, but merely the personally disagreeable consequences of the ministerial exception's application to the facts of his case. That the Court of Appeals' decision neither amplifies nor alters existing precedent is unimpeachably attested to by its unpublished status. Nonetheless, Clapper contends that this unsigned and unpublished decision will undermine the First

Amendment's even application. A reasoned examination of the authorities dispels this contention.

I.

THE MINISTERIAL EXCEPTION IS SETTLED LAW AND ITS CASE-SPECIFIC APPLICATION DOES NOT WARRANT CERTIORARI.

A. The Ministerial Exception, Which Bars the Adjudication of Employment Discrimination Claims by Religious Employees, Is a Settled Principle of Judicial Abstention That Properly Averts Constitutional Confrontations

The adjudication of civil rights claims will, on rare occasions, give rise to clashes with the First Amendment. Courts have adopted a policy of judicial abstention to avoid this potential calamity where the claimant is employed in a religious calling. This established principle of constitutional law enjoys wide support in both federal and state courts and it has been applied to a variety of religious employees. The history of this doctrine proves that it is no upstart, but a firmly rooted feature of the judicial landscape.

The Free Exercise clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend I. This Court has applied the limits of the First Amendment to the judicial as well as the legislative branches, *Kreshik v. St. Nicholas Cathedral of the Russian Orthodox Church of North America*, 363 U.S. 190, 191 (1960), and to state as well as federal governments. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940); *Everson v. Board of Education*, 330 U.S. 1, 8 (1947). Its precedents

also establish that governmental action may impermissibly burden free exercise by interfering with individual belief or practice, *Wisconsin v. Yoder*, 406 U.S. 205, 219-20 (1972), or by interfering with a church's ability to govern its internal affairs. *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929). In the latter category, this Court has demonstrated pronounced reluctance to interfere with a church's selection of its religious leaders. *Gonzalez*, 280 U.S. at 16; *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-10 (1976).

In the wake of the enactment of Title VII and the ADEA, federal and state courts have continued this policy of judicial abstention by creating the "ministerial exception." The ministerial exception to Title VII was first adopted in *McClure v. The Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972). While various rationales have been offered for the ministerial exception, it finds its unifying antecedents among this Court's church governance cases. *E.E.O.C. v. Catholic University*, 83 F.3d 455, 462 (D.C. Cir. 1996). Relying on these cases, subsequent courts uniformly have abstained from the adjudication of ministers' Title VII and ADEA claims. *See Young v. Northern Illinois Conference of United Methodist Church*, 21 F.3d 184 (7th Cir.), *cert. denied*, 513 U.S. 929 (1994); *Drevlow v. Lutheran Church*, 991 F.2d 468 (8th Cir. 1993); *Lewis v. Seventh-day Adventists Lake Region Conference*, 978 F.2d 940 (6th Cir. 1992); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990); *E.E.O.C. v. Southwestern Baptist Theological Seminary*, 651 F.2d 277

(5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982); *Schmoll v. Chapman University*, 83 Cal. Rptr. 2d 426 (Cal. Ct. App. 1999); *Pierce v. Iowa-Missouri Conference of Seventh-day Adventists*, 534 N.W.2d 425 (Iowa 1995), *cert. denied*, 517 U.S. 1220 (1996). The adjudication of such claims would inevitably chill the freedom of churches to choose those religious leaders best suited to their mission. This principle has been applied even where a religious reason has not been proffered for the termination, on the grounds that adjudicating the thorny questions of ministerial employment risks undesirable intrusion of civil authority into church affairs. *Rayburn*, 772 F.2d at 1169; *E.E.O.C. v. Catholic University*, 83 F.3d 455, 461, 464-65 (D.C. Cir. 1996); *Powell v. Stafford*, 859 F. Supp. 1343, 1349 (D. Colo. 1994).[7] As the *Rayburn* court noted, in "quintessentially

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7. Although Clapper's brief does not address this point, this Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), raises a potential issue as to whether the ministerial exception remains viable. In *E.E.O.C. v. Catholic University*, 83 F.3d 455 (D.C. Cir. 1996), the District of Columbia Court of Appeals addressed this issue squarely. The court held that *Smith* did not affect the

> long line of Supreme Court cases that affirm the fundamental right of churches to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."

83 F.3d at 462. *Smith*, the court concluded, was inapposite because it dealt with the right of an individual to observe a particular command or practice of his faith. By contrast, the ministerial exception is designed to protect the freedom of the church to select those who will carry out its mission. In the case at bar, the District

(Cont'd)

religious" matters the "free exercise clause protects the act of the decision rather than a motivation behind it." 772 F.2d 1169. *See also Catholic University*, 83 F.3d at 464-65.

The ministerial exception first employed in *McClure* also applies to the non-ordained. In *Rayburn*, the Fourth Circuit held that the ministerial exception is not limited to ordained ministers but may be applied to lay employees of religious institutions.

> "[I]f the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual or worship he or she should be considered 'clergy.' " (citations omitted).

(Cont'd)
Court concluded that the ministerial exception had survived *Smith* based on the *Catholic University* precedent. Pet. App. 25a-26a. The Court of Appeals' opinion is silent with respect to this issue.

More recently, an additional reason has arisen for doubting *Smith's* impact on the ministerial exception. Through the enactment of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb to 20000bb-4, Congress sought to restore the heightened scrutiny given statutes that threaten religious freedom. Although RFRA was found unconstitutional as to state statutes in *City of Boerne v. Flores*, 521 U.S. 507 (1997), there is now authority for the proposition that RFRA is constitutional when applied to federal statutes such as those at issue here. *Christians v. Crystal Evangelical Free Church*, 141 F.3d 854 (8th Cir.), *cert. denied*, 119 S. Ct. 43, 142 L. Ed. 2d 34 (1998). Thus, to the extent that *Smith* weakened the doctrinal basis for the ministerial exception, RFRA resuscitated it.

> This approach necessarily requires a court to determine whether a position is important to the spiritual and pastoral mission of the church . . .[8]

772 F.2d at 1169. *Rayburn* held that the "introduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state." *Id.* The ministerial exception preserves the delicate balance between the government's legitimate interest in regulating the working conditions of its citizens and the need for religious autonomy. In declining to apply Title VII, the *Rayburn* court emphasized that the very threat of judicial inquiry could skew the selection process by compelling church officials to adopt risk-averse behavior that favors not those best suited to its mission, but those least likely to provoke litigation.[9] *Id.* at 1170-71.

Under the *Rayburn* test, not all employees of religious institutions are denied the opportunity to litigate employment discrimination claims, but only those whose role is inherently religious. *Rayburn* covers those whose

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8. The *Rayburn* court cited with approval Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979). Professor Bagni explicitly anticipated, and endorsed, the ministerial exception's application to religious schools. *Id.* at 1545-46.

9. In another context, this Court noted yet another reason for declining to intervene in religious decision-making, namely the natural antagonism between the rational dictates of due process and the unreasoned imperatives of faith. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. at 714-15 (1976).

function is religious, recognizing that in many faiths formal ordination is not the touchstone of religious purpose. The Seventh-day Adventist educational system invests lay people with substantial religious responsibility. It does this because the Church founders possessed a firm conviction that education and religion were inextricably intertwined.[10] *Rayburn* assures the Church's ability to choose, without governmental interference, the persons charged with the essential task of inculcating religious values in young Seventh-day Adventists.

The *Rayburn* doctrine has been widely cited with approval and applied in a variety of contexts by federal and state courts.[11] Contrary to Clapper's suggestion, no federal

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10. "In the highest sense the work of education and the work of redemption are one . . ." Ellen G. White, EDUCATION 30 (1903). This principle is repeated in the Education Code at § 1028: "The mission of the school and the Church are identical — redemption is the task." Pet. App. 5a.

11. *E.E.O.C. v. Catholic University*, 83 F.3d 455 (D.C. Cir. 1996) (Catholic nun in university theology department deemed "ministerial" for purpose of Title VII claim); *E.E.O.C. v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982) (seminary faculty treated as "clergy"); *Himaka v. Buddhist Churches of America*, 917 F. Supp. 698, 709 (N.D. Calif. 1995) (de-funding of Buddhist education department deemed a "ministerial" question beyond the reach of temporal courts); *Powell v. Stafford*, 859 F. Supp. 1343 (D. Colo. 1994) (Roman Catholic high school theology teacher barred from litigating ADEA claim); *Welter v. Seton Hall University*, 608 A.2d 206, 214 (N.J. 1992) (employee's function rather than title determines whether courts should abstain from exercising jurisdiction); *Miller v. Catholic Diocese of Great Falls*,

(Cont'd)

circuit or state appellate court has repudiated its holding. The decisions in *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993) and *Geary v. Visitation of the Blessed Virgin Mary Parish School*, 7 F.3d 324 (3d Cir. 1993), cited by Clapper to sustain his position, are legally and factually inapposite.

Neither decision rejected, or even adjudicated, the ministerial exception test. Rather, each decision rests its analysis on this Court's doctrinally distinct *Catholic Bishop* construct. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). It is not apparent from a reading of the opinions whether the ministerial exception test was even raised by the parties. The approach employed by these courts does not suggest a split in the circuits so much as it suggests that factual differences may animate legally distinct forms of analysis. The ministerial exception was applied in neither case most likely because the churches failed utterly to present compelling facts sustaining its application.

Unlike Clapper, DeMarco was not responsible for teaching impressionable children in the lower grades, but instead taught high school math. He does not appear to have

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Billings, 728 P.2d 794 (Mont. 1986) (free exercise clause bars adjudication of parochial teacher's claims of breach of covenant of good faith and fair dealing in discharge); *Sabatino v. Saint Aloysius Parish*, 672 A.2d 217 (N.J. Super. App. Div. 1996) (role of principal at Catholic school deemed "ministerial"); *Jocz v. Labor and Industry Review Commission*, 538 N.W.2d 588 (Wisc. Ct. App. 1995) (director of field placement at seminary deemed "ministerial"); *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233 (Mich. Ct. App. 1988) (church organist deemed to be "clergy" and employment claims therefore barred).

been paid out of ministerial funds and he seems not to have been charged under church policy with the incorporation of religious values into the curriculum. He taught no theology or Bible as did Clapper. Pet. App. 9a. There was no evidence that he was required to be a church member, much less an active one. Similarly, the *Geary* decision offers scant evidence that application of the ministerial exception would have been appropriate. The only reference to a religious role in Geary's teaching was her "apparent general employment obligation to be a visible witness to the Catholic Church's philosophy and principles." *Geary*, 7 F.3d at 331. Thus, in both cases the church's attempt to block the adjudication of the discrimination claim was not premised on the teacher's actual role in the church, the *sine qua non* of ministerial exception litigation, but rather on his or her mere status as a parochial school employee. Rather than demonstrate the circuit split claimed by Clapper, these cases only show that a too facile resort to the First Amendment is unlikely to garner judicial approval.

The weakness of the factual record in both of these cases may also account for the courts' resolution of the *Catholic Bishop* inquiry. In light of the minimalist showing of religious purpose, both courts concluded that the cases presented little risk of First Amendment infringement. Accordingly, the courts found it unnecessary to employ *Catholic Bishop's* prophylactic measures. Clapper would have this Court believe that this is evidence of a circuit division warranting grant of a writ. It demonstrates only how inapt is the comparison to *Geary* and *DeMarco*. Those defendants failed to muster evidence of infringement and the courts found none; Chesapeake Conference, by contrast, made such a showing and the court so found.

B. *Rayburn's* Application in this Case Does Not Warrant Grant of a Writ

The balance of Clapper's petition takes issue with the application of the ministerial exception to the facts of his case. This is simply not a proper issue for certiorari review.

The unpublished decision of the Fourth Circuit establishes no precedent. 4TH CIR. R. 36(b) and (c). Moreover, even if published, the decision's weight would be diminished by the very nature of ministerial exception jurisprudence which insists on factually intensive case-by-case analysis. *Weismann v. Congregation Shaare Emeth*, 38 F.3d 1038, 1044 (8th Cir. 1994); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 363 n.3 (8th Cir. 1991). In the case at bar, the lower courts both emphasized that their decisions were limited to the precise facts before them. Pet. App. 19a, 39a. Clapper improperly seeks this writ to jettison the discerning, semi-permeable fabric of this case-by-case approach for a crude First Amendment sieve.

Furthermore, the doctrine's application to Clapper's claim was appropriate in light of this Court's frequent recognition of the inherently religious function of sectarian schools,[12] as well as the unrebutted evidence of Clapper's

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12. This Court has recognized consistently that parochial schools perform a vital part of the religious mission of a church. *See Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) (parochial schools involve substantial religious activity and purpose and are a "powerful" vehicle for transmitting religious values; this is "enhanced by the impressionable age of the pupils, in primary

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substantial religious purpose. Notwithstanding his post-judgment recantation, Donald Clapper served his Church in a religious capacity and, accordingly, his claims fall exclusively within ecclesiastical authority.

CONCLUSION

For all of the reasons set forth above, Clapper's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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schools particularly"); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979) (the reason for religious schools is the propagation of a religious faith); *Meek v. Pittenger*, 421 U.S. 349, 366 (1975) (the teaching process in religious schools "is, to a large extent, devoted to the inculcation of religious values and belief"); *Aguilar v. Felton*, 473 U.S. 402, 411-12 (1985) (elementary and secondary schools, unlike religiously affiliated colleges, are often "pervasively sectarian" and have as their "substantial purpose the inculcation of religious values"), *overruled on other grounds*, *Agostini v. Felton*, 521 U.S. 203 (1997).